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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 770

TED STEVEN CHIMEL,

Petitioner,

vs.

CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

PETITIONER'S REPLY BRIEF

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Questions Presented

The statement of the issues in this case, as phrased by the Respondent, raises certain problems which it is suggested may distract attention from the crucial issues presented by this case. Respondent sees three issues, each of which is poured from the same mold. Thus, it is asked:

> Was the search of petitioner's home *rendered unreasonable* by the presence or the absence of certain conditions?

To phrase the issues in this manner invites attention away from the fundamental issue. In other words, this manner of phrasing quietly suggests that an officer has some basic right to search—but, if certain conditions are found present, then a search carried out under this right may be "rendered unreasonable." Inquiry in this case, if it is to be fruitful, must start from the logical point of beginning:

> Does an officer have a right to make any invasion of individual liberty based on the facts of this case and if he does, what is the extent of that right and upon what legal authority does it rest?

Statement of the Case

Although the evidence has been extensively reviewed by the Respondent, several items have been overlooked which may lend clarity to consideration of the case. Only those items are noted here. Bracketed references are to pages of the Respondent's brief, A. refers to pages of the Single Appendix.

[10] Petitioner was arrested by Officer Del Coma on August 25 without a warrant. (A. 423-24, fn. 4)

[10-11] Attorney Jones stated to Officer Del Coma that he represented Hamburger. Attorney Jones did not ever state to Del Coma that he represented Chimel. Attorney Jones testified that he represented Hamburger. Attorney Jones testified that he never represented Chimel. (A. 269, 343)

[14-15] On the day following the burglary of the Money Vault, Slocum transmitted a list of the missing coins over the coin circuit teletype. (A. 176)

[20] Regarding identification of the missing coins, Slocum testified as follows:

> Well, as far as the items, this rare stuff that was taken wasn't the common every day—every-day stuff that you sell over the counter. In other words, it is stuff that you stock for people who want to invest a little more money, and what we did, just like a coin dealer, like a used car dealer knows his coins. *We know the coins we had.* (emphasis added.)
>
> Lot of people say, 'You can't keep track of the 20,000 coins in your head,' and this is true, but you have 15 coins that are of the value that you want to remember. The others are so close to face value, like in bags of pennies, which is 5,000 to a bag, worth 50, $55 each bag, but don't care about those dates, *but the particular items we had was missing, whichever you want to call it, at the time, was the ones that we knew.* (emphasis added.) (A. 176)

[29] The testimony of Morris Diehl on cross-examination, reads as follows in context:

> Q. I am interested in when Mr. Chimel talked to you about this very case. A. All he told me was that I would have to go to court to—he was—his attorney would give me a Subpena to go to court for him.
>
> Q. And he didn't tell you what it was going to be about? A. He said it was something about a burglary.
>
> Q. Just something about a burglary? A. Yes.
>
> Q. And you were going to come to court and testify to something about a burglary? A. Well, just to testify that he had bought these medals and tokens.
>
> Q. Oh, he told you to testify that he had bought the medals and tokens? A. Well, he did.

Q. Did you see the money change hands? A. I saw these medals and tokens—the fellow come around and asked me, and I said I couldn't use them, and then the next thing I know he had them, he had bought them.

Q. The next thing you knew he had them. A. Yes, he bought those.

Q. How do you know he bought them? A. Because first he was going to pay me, and he didn't. Then when he bought these he didn't have any money. (A. 303-04)

The testimony that Petitioner "told Diehl to testify that Petitioner had purchased the medals and tokens" appears to have been given by counsel for the prosecution.

ARGUMENT

SECTION I

Neither the Common Law nor the Prior Decisions of This Court Provide Legal Authority for the Search Made in This Case.

In the interest of brevity, response will be made, with one or two exceptions, only to the Respondent's major topic headings. The first of these, the proposition that *Giordenello* v. *United States,* 357 U. S. 480 (1958) permits an arrest on probable cause even though a defective arrest warrant is used (R. Br. 42-44), neither raises nor deals with any issue. Certainly there may be times when an officer might be required to have a valid warrant in order

to make a legal arrest.[1] But the facts of this case do not raise any issue in that regard and the point is conceded *arguendo*. (cf. P. Br. p. 26) It is observed though that the *Giordenello* holding involved only an arrest and a search of the person. Thus, *Giordenello* is not of aid in resolving the question at bar.

Respondent's second point urges that the "right" to conduct a search of the place of arrest incident to the arrest finds its basis in the common law and earlier decisions of this Court. (R. Br. 45-50) A strong case is made for the right of an officer making an arrest to search the person of the accused. That proposition, however, has already been conceded. So that argument does not help in this case. Notable, though, are the authorities cited by the Respondent in support of this "common law right" to search the place of arrest. Indeed, the cases cited are the very cases analyzed in Petitioner's opening brief, *Weeks* v. *United States,* 232 U. S. 383 (1913); *Carroll* v. *United States,* 267 U. S. 132 (1925); *Agnello* v. *United States,* 269 U. S. 20 (1925) and *Marron* v. *United States,* 275 U. S. 192 (1927). If Petitioner's analysis of these cases is correct, they do not support the existence of a "right, incident to arrest, to search the place of arrest."

Presumably, as support for the existence of this proposition at common law, the Respondent also cites Hale, *Pleas of the Crown,* 112-14 (1st Am. ed. 1847). The quotation from Hale says nothing about search of the place of arrest and therefore lends no substance to the claim. The

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[1] Probably the most frequently encountered example of such necessity would involve arrest for a misdemeanor which was not committed in the officer's presence. See California Penal Code sections 836, 837.

lack of reference to a supporting English case rather strongly suggests that there was no such right to search the place of arrest at common law. If there is such a case or such cases they would almost certainly conflict with *Entick* v. *Carrington,* 19 How. St. Tr. 1029 (1765), which has been cited time and again, with approval, in the opinions of this Court. See e.g. *Boyd* v. *United States,* 116 U. S. 616 (1886).

Respondent's second point therefore reduces, on analysis, to whole-hearted reliance on *United States* v. *Rabinowitz,* 339 U. S. 56 (1950). And the argument, essentially, is to the effect that *Rabinowitz,* because it exists, is right. Certainly there is some strength to that argument which may not be lightly discounted.

But it seems impossible to square the "no warrant is required" language of *Rabinowitz* with the liberty-preserving words of Lord Camden in *Entick.* And if Lord Camden's opinion in that famous case is representative of the common law basis of the Fourth Amendment, then the words of Chief Justice Marshall in America's most fundamental and most well known constitutional case may be apropos:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected . . . The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

Marbury v. *Madison,* 5 U. S. [1 Cr.] 137, 176 (1803). If *Entick* is right, the statement in *Rabinowitz* that "no warrant is required" is wrong.

The Respondent's third point suggests that under present law the search in this case was reasonable and proper. (R. Br. 45-99) In making this argument, the Respondent finds itself impaled on a two-pronged logical dilemma which is dealt with most artfully but which, by its nature, must come to grief on close scrutiny. Respondent observes that Officer Del Coma had a good deal of contact with Deputy District Attorney Law regarding this case before any warrant was issued or any search made. (R. Br. 72) It is conceded that "exigent circumstances" were not shown to be present. (R. Br. 71) Urging then that the officer had sufficient information known to him to have obtained a search warrant at the time, Respondent states:

> . . . it is apparent that everything pointed to the likelihood of the stolen coins being at petitioner's residence and nothing suggested their being any place else.[2] (R. Br. 75)

If this was the officer's state of mind, it seems inescapable that when he went to Petitioner's residence, he went there for the express purpose of searching that place. The lack of any evidence to show a search of Petitioner's person prior to searching the residence strongly supports this view. Thus, if Respondent is correct as to the likelihood

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[2] In fact, the evidence showed just the opposite. Mr. Law, it is recalled, was "not satisfied" with the state of the evidence to justify Petitioner's arrest on August 30. (A. 380) Thereafter, "once there was definite information concerning petitioner's statement to Parsons", Mr. Law authorized the arrest. But the information as to Parsons also supplied good reason to think that petitioner was *not* in possession of stolen coins. Petitioner stated to Parsons, in the same conversation, that he had "given the coins to somebody else." (A. 196) In addition, a substantial number of stolen coins had been, by that time, seized from Jones and identified by Slocum. (A. 268-69)

of stolen coins being in Petitioner's residence, then the series of meetings between Officer Del Coma and Deputy District Attorney Law must have involved some consideration of obtaining a search warrant and Mr. Law must have rejected the suggestion. The reason for this veto, if there was such, is amply apparent. The officer testified that he had no reason to believe that any particular property was present in Petitioner's home. (A. 230, 235) As the preceding footnote indicates, the officer actually had good reason to believe that Petitioner did not have the coins. On this state of affairs then, no one could have executed an affidavit alleging belief that described property was likely to be found in Petitioner's residence. No search warrant could have issued. California Penal Code sections 1525, 1527.

It is then argued that the extreme difficulty of identifying and describing the Slocum coins supplied a reason for dispensing with a search warrant in this case. (R. Br. 76) "These [some delay and inconvenience] are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement." *Johnson* v. *United States,* 333 U. S. 10, 15 (1948) But more significantly this claim does not comport with Slocum's testimony. Slocum published a list of the stolen coins on the coin circuit teletype the day after the burglary. (A. 176) Slocum testified that he could identify his coins. (*ibid.*) The search took place one month after the burglary and Slocum's list had been, by then, several times carefully revised. Thus, if Respondent is urging that Slocum's testimony was not very reliable, Petitioner has no quarrel with that contention.

In fact, this branch of Respondent's argument very pointedly avoids the obvious. Slocum's list of the miss-

ing coins, the existence of which was known to both Law and Del Coma, could have been appended to an affidavit with the click of a staple. Rather, it is argued that since Slocum's description of the missing coins might have been somewhat inexact, although there is no evidence to support that conclusion, it is therefore better to proceed with no description whatsoever. The statement of the argument provides its own refutation.

One other point is worthy of mention here. If it is assumed that Slocum's list had been appended to an affidavit and a search warrant had been issued thereon, the seizure of evidence which was relevant to this case would not have been possible. It seems clear that all concerned considered the fruit of the September 13 search and its subsequent identification by the Pulatis necessary to demonstrate "cause to arrest" for the Pulati burglary. (A. 234-35) The Pulati identification was grounded on their recognition of medals, tokens, a coin wallet and other non-coin items. (A. 275-84) In contrast with that fact, there is no evidence in the record that Slocum claimed the loss of anything other than coins. Therefore, a search made under warrant for Slocum's missing coins would not have justified seizure of the items which the Pulatis in fact identified, the medals, the tokens, the boxes and the coin wallet.[3] It is therefore clear that the search

[3] This conclusion is not diluted by Petitioner's earlier analysis of *Marron* v. *United States*, 275 U. S. 192 (1927), P. Br. 17-18. The *Marron* ledger was directly related to the crime for which the warrant issued. On this record, no relationship can be spelled out between a theft of coins and a seizure of tokens, medals, boxes, etc. Cf. *Rugendorf* v. *United States*, 376 U. S. 528 (1964) in which the warrant issued for 82 mink, otter and beaver stoles and jackets (none full-length) stolen in Alabama. 81 fur pieces were seized, 59 of which were from the Alabama theft and 22 of which had been stolen in Louisiana.

of September 13, 1965, was a search for which a search warrant could not have been obtained and it resulted in a seizure which would not have been sustainable even if a warrant had issued. Admission into evidence of the fruit of that search has deprived the Petitioner of a right guaranteed to him under the Constitution of the United States.

SECTION II

Considerations of Public Policy Militate Against the Search Which Was Made in This Case.

Respondent suggests (R. Br. 83-100) that a rule requiring the use of search warrants except where exigent circumstances of some sort are demonstrated would shackle the hands of law enforcement, would flood the lower courts with rivers of paper work and would foster a massive burglary wave. This parade of imaginary horribles, although interestingly presented, leaves the reader somewhat unsatisfied for the question is not whether the warrant procedure is desirable. That question was determined on December 15, 1791, when the Fourth Amendment was adopted and is not now open to challenge.

Mr. Justice Bradley, in writing his famous opinion in *Boyd* v. *United States*, 116 U. S. 616 (1886) referred to the contiguity, and sometimes overlapping scope, of the rights guaranteed by the Fourth and Fifth Amendments. 116 U. S. 630. There can be no doubt that law enforcement would be much simpler and easier, more effective and less burdened with paperwork, if the Fifth Amendment were repealed. By like token, the Fourth Amendment is no friend to the policeman. But while those Amendments remain vital and active parts of our living Constitution, it

begs the question to ponder the wisdom of the policies enshrined therein.

The policy which should be in the forefront and the policy to which the Fourth Amendment squarely addresses itself is that essential principle, which is as old as the *Magna Carta*, that the government may not act to deprive its subjects of liberty except through the action of courts constituted for that purpose. Writing of the exclusionary rule in *People* v. *Cahan*, 44 C. 2d 434, 447; 282 P. 2d 905 (1955), Justice Traynor pointed out:

> Experience has demonstrated, however, that neither administrative, criminal nor civil remedies are effective in suppressing lawless searches and seizures. The innocent suffer with the guilty, and we cannot close our eyes to the effect the rule we adopt will have on the rights of those not before the court . . . 'The difficulty with [other remedies] is in part due to the failure of interested parties to inform of the offense. No matter what an illegal raid turns up, police are unlikely to inform on themselves or each other. If it turns up nothing incriminating, the innocent victim usually does not care to take steps which will air the fact that he has been under suspicion.' [Quotation from *Irvine* v. *California*, 347 U. S. 128, 137 (1954)]

Thus, when the police officer is given a blank check to search without warrant, the innocent victim of a lawless search travels a one-way street. He can, if he wishes, pursue a civil action against the officer in which there is a very limited possibility of recovery and which shouts to the world that he has been suspected of crime, or he can go without remedy and hope that his luck will improve in the future.

The Respondent contends that law enforcement will, if left to their own devices, increasingly use the search warrant procedure. (R. Br. 88) An interesting commentary on that contention is provided in a motion to suppress evidence (California Penal Code section 1538.5) made in the case of *People* v. *Crispin Ramirez,* Superior Court, County of Santa Clara, State of California, No. 45854, January 31, 1969. The arresting officer, Officer Erickson, testified:

> Q. So you knocked on the door, a person opened the door, and within three to five seconds you went inside; is that correct? A. That is correct.
>
> Q. You didn't at that time announce that you were there to arrest Crispin Ramirez; is that correct? A. I didn't announce that I was there to arrest Crispin Ramirez.
>
> Q. You were there with the express intention to arrest Crispin Ramirez. A. Yes.
>
> [Page 8]
>
> Q. Did you, in fact, arrest Crispin Ramirez? A. Yes.
>
> Q. After you arrested him, did you take him out of the apartment? A. Yes, sir.
>
> Q. And after he was out of the apartment, was he in fact handcuffed and placed in a patrol car? A. Yes, sir.
>
> Q. After that point in time, Officer, did you in fact go back inside the apartment? A. Yes, sir.
>
> Q. Did you in fact conduct a detailed search of the apartment? A. Yes.
>
> [Page 9]

Q. And, Officer Erickson, had you ever seen Crispin Ramirez at that address before? A. No, sir.

Q. And I take it, to clarify what you did, you went out there three days later because of some information you had learned about these items you had seized on the 23rd; is that correct? A. Correct.

Q. Did it take you that long to get that information? A. Yes, sir, it did.

Q. All right. When you got the information, did you apply for a search warrant or arrest warrant? A. No, sir, I did not.

Q. Why was that? A. I can't—I have never been able to obtain a search warrant. I have never heard of an officer obtaining one. It just isn't done.

[Page 11]

In summary, the Respondent agrees that it is desirable to make greater use of search warrants, this Court has stated that search warrants must, whenever practicable, be used, and the Petitioner urges their use. The Respondent suggests, though, that this desirable end be left to voluntary compliance and not be made mandatory. That suggestion bears more than a passing resemblance to the husband who, faced with an action for divorce and a demand for alimony, pleads:

> Certainly I am anxious to support my wife. I will voluntarily give her more than she needs. But don't embody this in a court order for I would hate to feel that I was required to do this.

This Court has, on facts showing restrained conduct which could have been authorized by a magistrate, required that

antecedent justification be obtained. *Katz* v. *United States*, 389 U. S. 347, 356 (1967). There is no less reason to do so here.

SECTION III

The Admission Into Evidence of the Fruit of the Search Was Beyond Reasonable Doubt Harmful.

Contending that the error in this case was harmless, the Respondent would segment the evidence and view it as though two trials had been had, a separate trial on the Pulati count and a separate trial on the Money Vault count. No matter formal legal theories of pleading and joinder, such an approach overlooks the realities upon which juries decide concrete cases.

First, as to the Pulati count, it is submitted that on the face of the record there was not sufficient evidence to support a finding of "cause for arrest," much less proof of guilt beyond reasonable doubt, in the absence of the fruit of the search of September 13. See p. 9, *supra*.

The argument is then made that since none of the seized coins were identified as having come from the Money Vault, any error in their admission could not have possibly affected the trial on that charge. While this argument has a superficial lure to it, closer scrutiny reveals the tattered fabric from which it is pieced together.

The keystone of Petitioner's defense was Morris Diehl, who testified that Petitioner had, in his presence, purchased the Pulati medals and tokens (Ex. 11-A) at a coin auction in Hawthorne shortly after the Pulati burglary. (A. 298-300) It is clear that if the jury had accepted Diehl's testimony, Petitioner could not have been

convicted of the Pulati count. With rejection of Diehl's testimony, the entire defense began to crumble. Diehl was either deluded or untruthful, reasoned the jury. Either way, Petitioner was necessarily branded with the mark of deception. From there it was a short step to accept the Court's instruction and "reject the whole testimony" of the Petitioner.[4] Therefore, the introduction in evidence of the Pulati coins was convincing enough to the jury to induce disbelief of both Diehl and the Petitioner. That fact, disbelief of the Petitioner, in practical effect deprived him of any defense to the Money Vault count, for his defense rested on his own testimony.

But, on this point, the Money Vault burglary, considered in light of prejudicial error, the testimony of the victim, Slocum, is most interesting.

Most of Slocum's inventory during 1965 was obtained by purchase from other coin dealers. (A. 149) His inventory remained about level during late 1964 and 1965 at something near $19,000. (A. 145) Of his inventory at the time of the burglary, $2,500 (face value) of coins were on deposit in the Independent Bank in Anaheim and were not involved in the burglary. (A. 141) The morning after the burglary, Slocum saw "20, $25,000 worth of coins on the floor." (A. 89) Only his more valuable coins were missing. (A. 94-95) His inventory after the burglary was "in the two or $3,000 figure." (A. 147) Slocum's business showed a net loss for all of 1964 and the first half of 1965. (A. 144) Slocum, in July of 1965, was driving a Volks-

[4] "A witness wilfully false in one material part of his testimony is to be distrusted in others. You may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence, you shall believe the probability of truth favors his testimony in other particulars." (A. 21)

wagen. (A. 350-52) By August of 1965, Slocum was driving a 1965 Cadillac. (A. 185) Petitioner concurs, Slocum's testimony was not very reliable.

It is undoubtedly inappropriate to suggest to an appellate court that it should redetermine facts once found by a jury. Petitioner makes no such contention here. Rather, the evidence mentioned above is directed only to a showing that absent the implied impeachment of Petitioner's testimony which must have taken place in connection with the Pulati count, the evidence given by the "victim" Slocum leaves room for very serious doubt as to whether he was the victim of a burglary or perhaps the perpetrator of an insurance fraud. It is respectfully urged that the admission of the challenged evidence was harmful as a matter of law. *Fahy* v. *Connecticut*, 375 U. S. 85 (1963).

Conclusion

Based upon the foregoing arguments and authorities, and those set forth in Petitioner's Opening Brief, it is respectfully requested that the judgment of the Supreme Court of the State of California be reversed and the case remanded for further appropriate proceedings.

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